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### Recent Decisions

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silence as to ulterior motives beyond tax territory, and the court has learned how to shut its eyes to things it does not care to see."<sup>56</sup>

While the Court has confessed that a very clear case must be found to upset the validity of a federal tax, in the same breath it has admitted that such plain cases may exist.<sup>57</sup> A valid tax must be a revenue measure, although collaterally it may exert a regulatory effect,<sup>58</sup> but it may not go so far as to impose an additional sanction for the commission of a crime.<sup>59</sup> To cast the test in a positive framework, it can be said that a tax is valid when its basic purpose is the national welfare, as contrasted with the local.<sup>60</sup> Thus it is that in order to avoid such consequences as Justice Black perceives, the extension of federal taxation can be valid only when it is not used to coerce compliance or punish non-compliance with matters of purely local concern.

Robert L. Berry

John M. Sullivan, C.P.A.

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## RECENT DECISIONS

CONTRACTS—REFORMATION OF INSTRUMENTS—FAILURE TO READ BEFORE SIGNING AS A BAR TO RELIEF.—*Lane v. Mathews*, .... Ariz. ...., 245 P.(2d) 1025 (1952). This was an action instituted by a lessee for damages arising from the breach of a disputed lease. The defendant lessors answered and counterclaimed with a petition for reformation of the lease to conform to the actual agreement of the parties. The attorney for the defendants drew up the written instrument which was read by the defendants and then delivered to the lessee. The latter took it to his attorney's office where an entirely new page was substituted in the instrument, supposedly to embody the original oral terms. The lessee signed the contract and returned it to the defendants without calling attention to the alteration, and the defendants afterwards signed the lease without re-reading it completely. The damages claimed arose from an alleged breach of the conditions embodied in the substituted page.

The trial court rendered judgment for the plaintiff and found against the defendants in their counterclaim. The judgment was re-

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<sup>56</sup> PAUL, TAXATION FOR PROSPERITY 213 (1947).

<sup>57</sup> *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 57 S.Ct. 764, 81 L.Ed. 1122 (1937).

<sup>58</sup> *United States v. Sanchez*, 340 U.S. 42, 71 S.Ct. 108, 95 L.Ed. 47 (1950); *Sonzinsky v. United States*, 300 U.S. 506, 57 S.Ct. 554, 81 L.Ed. 772 (1937); *Nigro v. United States*, 276 U.S. 332, 48 S.Ct. 388, 72 L.Ed. 600 (1928).

<sup>59</sup> *United States v. Constantine*, 296 U.S. 287, 56 S.Ct. 223, 80 L.Ed. 233 (1935).

<sup>60</sup> *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477 (1936).

versed on the hearing of the first appeal, *Lane v. Mathews*, 73 Ariz. 435, 242 P.(2d) 557 (1952). But on motion for rehearing the Supreme Court of Arizona affirmed the decision of the trial court, and held that as between fraud and gross negligence, the latter will suffer. This decision reiterates the rule that signing an instrument before reading it constitutes negligence barring reformation, despite fraud or mutual mistake.

An examination of the cases cited in support of this principle reveals that the earlier decisions in Arizona developed a strict rule. The decision in the instant case, an action in equity, finds its genesis in actions at law. In *Bradley v. Industrial Commission*, 51 Ariz. 291, 76 P.(2d) 745 (1938), an action at law to set aside a written instrument, the court refused to admit parol evidence for the express reason that there was no fraud shown. The court refused to aid the negligent party who had failed to read the instrument. This somewhat harsh thesis is supported by *In re McDonnell's Estate*, 65 Ariz. 248, 179 P.(2d) 238 (1947); *Mutual Ben. Health & Accident Ass'n v. Ferrell*, 42 Ariz. 477, 27 P.(2d) 519, 524 (1933); *History Co. v. Dougherty*, 3 Ariz. 387, 29 Pac. 649, 651 (1892).

At law, avoidance of contractual liability must necessarily be more strict than the rule of equity governing the reformation of an instrument to conform to the actual agreement of the contracting parties. It is submitted that a rule refusing complete avoidance of contracts at law is hardly a substantial basis for the refusal of reformation in a court of equity.

While, in an action at law, a party is bound by the terms of his contract whether he has read it or not, *New York Life Ins. Co. v. Fletcher*, 117 U.S. 519, 6 S.Ct. 837, 29 L.Ed. 934 (1886), failure to read before signing is not in itself a complete defense to a plea for reformation in equity. *Sanders v. Monroe*, 10 F.(2d) 997 (D.C. Cir. 1926); *Dwyer v. Curria*, 52 R.I. 264, 160 Atl. 206 (1932). It has been held that an individual may rely on the fact that a formal document prepared by the other party will express their original agreement. He may expect and rely on literal conformity if no other notice is given. *Connecticut Fire Ins. Co. v. Oakley Improved Building & Loan Co.*, 80 F.(2d) 717 (6th Cir.), cert. denied, 298 U.S. 687, 56 S.Ct. 954, 80 L.Ed. 1406 (1936). How much greater reliance is justified when the subscriber prepared the instrument himself as in the instant case? A written agreement at variance with the original understanding will be reformed when the mistaken party, justifiably relying on the expressed or implied representation of literal conformity, fails to observe the alteration. The failure to read is a mere inadvertance not amounting to the breach of a positive legal duty. *Home Ins. Co. of New York v. Sullivan Machinery Co.*, 64 F.(2d) 765, 767 (10th Cir. 1933).

Silence on the part of the fellow contractor who knew of the error of the signer has been regarded as sufficient fraud to provide the basis for reformation. The court, in *Wilson v. Moriarity*, 88 Cal. 207, 26 Pac. 85, 86 (1891), said:

The only fraud necessary to sustain the judgment is such as may be inferred from the failure of the defendant to correct the mistake of the plaintiff known to or suspected by the former at the time of the execution of the lease.

Accord: *Hines v. Bauer*, 158 Minn. 298, 197 N.W. 483 (1924); *O'Connor v. Hemeyer*, 52 S.D. 159, 216 N.W. 887 (1927). In New York the rule was stated emphatically in an early decision, *Albany City Savings Institution v. Burdick*, 87 N.Y. (42 Sick.) 40, 46-7 (1882):

It has certainly never been announced as the law in this State that the mere omission to read or know the contents of a written instrument should bar any relief by way of a reformation of the instrument on account of mistake or fraud.

This rule was reaffirmed in *L. Lewitt & Co. v. Jewelers Safety Fund Soc.*, 249 N.Y. 217, 164 N.E. 29, 31 (1928). Deciding that formulating a written contract contrary to the original agreement and allowing another to sign it without full disclosure was fraudulent, an Indiana court held that failure to read before signing would not bar reformation of the instrument. *McNair v. Public Sav. Ins. Co. of America*, 88 Ind. App. 386, 163 N.E. 290 (1928). Later decisions have reiterated the rule in granting reformation, and have refused to allow an individual, who created an instrument materially different from the original consensus *ad idem*, to place the risk of non-discovery on the signer. *Hammond Hotel & Improvement Co. v. Perrin*, 96 Ind. App. 311, 184 N.E. 906 (1933).

If it is necessary to choose between negligence in the foolish and fraud in the deceitful, a practical solution to the problem is the doctrine pronounced by the California courts, where the situation is specifically covered by statute. CAL. CIVIL CODE § 3399 (1949). This statute provides that a written agreement not expressing the intention of the parties may be revised so as to set out the true intention where interests of innocent third parties are not impinged.

A representative application of that statute was had in *Tomas v. Vaughn*, 63 Cal. App.(2d) 188, 146 P.(2d) 499 (1944). There, the plaintiff sought reformation of a written contract, alleging fraud on the part of the defendant. The defendant set up the plaintiff's failure to read before signing as a defense. In granting reformation the court said that failure to read must always be explained. Whether or not an omission constitutes negligence as to prevent reformation must depend upon the facts of each case. If the error was entirely unilateral on the part of the non-reading subscriber, traceable solely to his carelessness, reformation should properly be denied. If, however, the negligence was induced by the fraud of the other party, the court will reform the instrument to conform to the true intentions and agreement of the parties. It is submitted that this is the more equitable rule and will more fully achieve the ends of justice.

William Fleming

FOREIGN CORPORATIONS—SUBJECTION TO JURISDICTION—NECESSITY OF PRESENCE WITHIN THE STATE OF THE FORUM.—*Polizzi v. Cowles Magazines, Inc.*, 197 F.(2d) 74 (5th Cir. 1952). The defendant, Cowles Magazines, Inc., an Iowa corporation, the publisher of Look magazine, printed allegedly libelous matter about the plaintiff, Polizzi, charging him with being a member of Mafia, a powerful criminal organization. Polizzi, a Florida resident, brought suit in the Circuit Court of Dade County, Florida. After removal to the United States District Court for the Southern District of Florida, the action was dismissed under 28 U.S.C. § 1391 (c) (Supp. 1952), for lack of jurisdiction, on the ground that the defendant was not doing business in the district and was not subject to service of process. It was shown by deposition that the defendant maintained no office, no letter or telephone address there, and that its only employee who spent any time in the state had no authority to contract, collect money, or to incur liability in its name. The fact that the employee of the defendant regularly entered the district to promote circulation and to follow up complaints of retailers was insufficient activity to be called "doing business" which would subject the corporation to jurisdiction by service of process on its employee.

This case raises the question: How much or how little may a foreign corporation do before it will be said to be carrying on business within the jurisdiction so that the courts may obtain *in personam* jurisdiction by service of process on its agents or employees?

It might be well to call attention to the fact that no court has attempted a specific rule to fit all situations. To a great extent each case depends upon its own facts. *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79, 38 S.Ct. 233, 235, 62 L.Ed. 587 (1918); *International Harvester Co. v. Kentucky*, 234 U.S. 579, 34 S.Ct. 944, 945, 58 L.Ed. 1479 (1914); *St. Louis Southwestern Ry. v. Alexander*, 227 U.S. 218, 33 S.Ct. 245, 247-8, 57 L.Ed. 486 (1912). This lack of a standard, no doubt, accounts for the large number of cases in which the question arises.

Originally it was held that a corporation, being an artificial person, had no existence at all outside the borders of the state which chartered it. *Cf. Bank of Augusta v. Earle*, 13 Pet. 519, 10 L.Ed. 274, 308 (U.S. 1839). Subsequently, the view was taken in *Lafayette Insurance Co. v. French*, 18 How. 404, 15 L.Ed. 451 (U.S. 1855), that a foreign corporation "impliedly consented" to service on its agents in suits founded on contracts which the agents had negotiated in the foreign jurisdiction.

Later, the "implied consent" theory was replaced by the "presence" test, which made doing business depend on whether the corporation carried on a sufficient degree of activity to justify the determination that it was present within the state. *International Harvester Co. v. Kentucky*, *supra*; see *Philadelphia & Reading Ry. v. McKibbin*, 243 U.S. 264, 37 S.Ct. 280, 61 L.Ed. 710 (1917); *Green v. Chicago, B. & Q. Ry.*, 205 U.S. 530, 27 S.Ct. 595, 51 L.Ed. 916 (1907).

"Presence" as a test has recently been rejected by dicta in *Inter-*

*national Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The Court said that the question was whether jurisdiction over a foreign corporation will violate "traditional notions of fair play and substantial justice," which involves balancing the inconvenience to the foreign corporation of defending suit in the forum against the inconvenience to the plaintiff in bringing suit in the corporation's domicile. The nature and quality of the acts rather than mere quantity became the deciding factor, and in practice, jurisdiction has been granted whenever it will not violate the requirements of due process.

In the *International Shoe* case, *supra*, service of process in the state of Washington on a resident salesman of the shoe company was valid even though he had no power to contract, the company had no stock of merchandise in the state and all shipments were made f.o.b. St. Louis. The salesmen, however, sometimes rented display rooms for their samples. Even though the "presence" theory could have been applied under these acts, it was rejected as begging the question, since, as pointed out, 326 U.S. at 316-7:

... the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.

The "fair play and substantial justice" test was applied in the *International Shoe* case to instances where the suit arose out of the corporation's activities within the state; however the rule has been extended to include actions outside the state's borders. Cf. *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 335 (1952).

The "fair play" theory seems no more definite than its predecessor. Using either test the court must still determine from the facts of each individual case whether or not the foreign corporation should be subject to its jurisdiction. Can it be said that the "nature and quality" of acts can be evaluated more accurately than their "quantity"?

Before the decision in the *International Shoe* case, the "presence" doctrine required service of process to be quashed in practically every libel action against foreign publishing corporations. *Street & Smith Publications v. Spikes*, 120 F.(2d) 895 (5th Cir.), cert. denied, 314 U.S. 653, 62 S.Ct. 102, 86 L.Ed. 524 (1941); *Whitaker v. Macfadden Publications, Inc.*, 105 F.(2d) 44 (D.C. Cir. 1939). *Contra: Acton v. Washington Times Co.*, 9 F. Supp. 74 (D. Md. 1934). Mere solicitation of business by an agent does not constitute such a doing of business as to subject a foreign corporation to the local jurisdiction. *Cannon v. Time, Inc.*, 115 F.(2d) 423 (4th Cir. 1940). An Illinois newspaper publishing corporation maintained a news gathering agency in the District of Columbia consisting of a manager, three reporters and two telegraphers. The manager could hire and discharge employees and purchase supplies, but he made no contracts and received no money for the company. It was held that gathering news and then transmitting it by leased wire was not doing business within that jurisdiction, and the corporation could not be subjected to a

libel suit there. *Layne v. Tribune Co.*, 71 F.(2d) 223 (D.C. Cir.), cert. denied, 293 U.S. 572, 55 S.Ct. 83, 79 L.Ed. 670 (1934).

If those cases arose today under the *International Shoe* doctrine, the corporations would probably be required to defend the libel suit. The facts in *Kilpatrick v. Texas & P. Ry.*, 166 F.(2d) 788 (2d Cir.), cert. denied, 335 U.S. 814, 69 S.Ct. 32, 93 L.Ed. 369 (1948), are almost identical with those of *Green v. Chicago, B. & Q. Ry.*, supra. The two cases present opposite holdings: *Green* was decided under the "presence" test; *Kilpatrick* under "fair play and substantial justice." The "fair play" test requires only that due process be given, *Cloverleaf Freight Lines, Inc. v. Pacific Coast Wholesalers Ass'n.*, 166 F.(2d) 626 (7th Cir.), cert. denied, 335 U.S. 823, 69 S.Ct. 46, 93 L.Ed. 377 (1948), while the "presence" theory requires a certain minimum of activity before a corporation is "doing business." *St. Louis Southwestern Ry. v. Alexander*, supra. This is sometimes known as the "solicitation plus" rule.

Whether justice will permit a suit against a foreign corporation in a particular jurisdiction should not be determined by mechanically weighing the amount of activity there. All that is necessary under the *International Shoe* theory is that some representatives of the corporation be present in the jurisdiction upon whom the complaint may be served, and that there be no unusual circumstances, such as undue expense or lack of witnesses, which would prevent a fair disposition of the case. Cf. *Goldstein v. Chicago, R.I. & P. R.R.*, 93 F.Supp. 671 (W.D. N.Y. 1950).

Though it is no more definite than the "presence" test, the new rule greatly broadens the jurisdiction of courts over foreign corporations. The possible effect is so great that some courts have refused to follow it, *Steinway v. Majestic Amusement Co.*, 179 F.(2d) 681 (10th Cir. 1949), cert. denied, 339 U.S. 947, 70 S.Ct. 802, 94 L.Ed. 1362 (1950), and others have ignored it entirely. See *Rosenthal v. Frankfort Distillers Corp.*, 193 F.(2d) 137 (5th Cir. 1951). If, in the instant case, the court had relied on the "fair play and substantial justice" theory, it is quite possible that the defendant would have been subject to service, since the alleged wrong, the publication of a libel, actually took place within the court's jurisdiction, and a representative of the defendant, its assistant circulation manager, was present in the state acting in behalf of the defendant. Whether or not his activities were substantial enough to amount to "carrying on business" would have been immaterial. Any non-resident natural person may be served with a summons for an act committed within the jurisdiction if he reenters that jurisdiction. It seems reasonable that service on a nonresident corporation through its agent or employee within the jurisdiction should be upheld, since it fulfills the real purpose of service, giving fair notice to the defendant, and avoids the unrealities of jurisdictional hide-and-go-seek.

Edward L. Burke

**LIBEL AND SLANDER—EXECUTIVE OFFICER'S PRIVILEGE—SCOPE OF AUTHORITY.**—*Matson v. Margiotti*,.... Pa. ...., 88 A.(2d) 892 (1952). The Attorney General of Pennsylvania wrote a letter to the District Attorney of Allegheny County which informed him of the Communistic activities and proclivities of an assistant on the latter's staff and which urged dismissal of this assistant district attorney. At the time of mailing, the Attorney General released a copy of the letter to the press. The assistant district attorney then sued the Attorney General for libel. The Supreme Court of Pennsylvania held that although the statements in the letter regarding the assistant district attorney's alleged Communistic activities were libelous per se, the letter was absolutely privileged, regardless of malice, since the Attorney General was acting within the scope of his authority.

There is no question of absolute privilege so long as the Attorney General has acted within the scope of his authority. The foundation for that rule is found in *Spalding v. Vilas*, 161 U.S. 483, 16 S.Ct. 631, 637, 40 L.Ed. 780 (1896), where it is stated that:

... the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions apply, to a large extent, to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law.

The rule of *Spalding v. Vilas*, *supra*, was followed in the more recent cases of *Cooper v. O'Connor*, 99 F.(2d) 135 (D.C. Cir.), *cert. denied*, 305 U.S. 643, 59 S.Ct. 146, 83 L.Ed. 436 (1938); and *Glass v. Ickes*, 117 F.(2d) 273 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718, 61 S.Ct. 441, 85 L.Ed. 468 (1941). The real issue then is to determine the limits of the scope of authority which will entitle executive officers and administrative officials to an absolute privilege in their publications.

"Scope of authority" was tersely summarized by the court in *Cooper v. O'Connor*, *supra*, 99 F.(2d) at 139, where the court said:

It is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute . . . or even that they should be specifically directed or requested by a superior officer. . . . It is sufficient if they are done by an officer "in relation to matters committed by law to his control or supervision," . . . or that they have "more or less connection with the general matters committed by law to his control or supervision," . . . or that they are governed by a lawful requirement of the department under whose authority the officer is acting.

Considering the phrases "in relation to" and "more or less connection with" as applied to the general matters committed by law to an official's supervision, it would seem that the courts are almost unlimited in the exercise of their judicial discretion and would have little trouble in finding absolute privilege to exist.

In *Glass v. Ickes*, *supra*, the Secretary of the Interior released to the press a statement that the plaintiff had been barred from practice



before the Department of the Interior and urged that the oil companies should not contribute to his lobby. The court invoked the rule of *Spalding v. Vilas*, *supra*. However, in further comment it added, 117 F.(2d) at 277, "It may be that there are circumstances under which an official would exceed his prerogative in issuing a particular communication to the press."

In *Mellon v. Brewer*, 18 F.(2d) 168 (D.C. Cir.), *cert. denied*, 275 U.S. 530, 48 S.Ct. 438, 72 L.Ed. 409 (1927), defamatory statements, which challenged the good faith of the plaintiff in an investigation of the Treasury Department, were contained in a written report from the Secretary of the Treasury to the President. After the report was received by the President, the Secretary of the Treasury released the report to the press. It was this publication which the plaintiff argued was not absolutely privileged. The court held, however, that since the President probably would have released the report, and since there was no evidence showing that he had not authorized the Secretary of the Treasury to make its contents public, the report was of such public interest that its release to the press was absolutely privileged.

In *Schlinkert v. Henderson*, 331 Mich. 284, 49 N.W.(2d) 180 (1951), a member of the state liquor control commission wrote a letter to the state civil service commission expressing his views on a proposed reorganization of the liquor control commission. The letter contained allegedly libelous allegations about the plaintiff and was made available to the newspapers. The court, in reconciling the extension of scope of authority to permit absolute privilege, stated, 49 N.W.(2d) at 183, that "the public was interested in the proposed reorganization. . . . Under all the circumstances, defendant had an official right to permit the public to be informed." This case parallels the instant case and supports the decision that the doctrine of absolute privilege is applicable.

Absolute privilege has been given to slander in statements made by a collector of internal revenue to clients of the complainant about the latter's capacity to do business, *Tinkoff v. Campbell*, 86 F. Supp. 331 (N.D. Ill. 1949). A similar grant of absolute privilege for acts within the scope of authority has been granted in a malicious prosecution action: where a deputy fire marshall instituted arson proceedings without probable cause and with malice, because under the authority of a state statute, the court, in holding him free from personal liability, said that "He has a choice—sometimes called a 'discretion'—to initiate or not to initiate such a criminal proceeding. The public welfare requires that this choice shall be free of all fear of personal liability." *Phelps v. Dawson*, 97 F.(2d) 339, 340 (8th Cir. 1938). Cf. *Gregoire v. Biddle*, 177 F.(2d) 579, 580 (2d Cir. 1949), *cert. denied*, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950).

Although the courts have shown a common tendency to expand the phrase "scope of authority" to its fullest meaning, merely intimating that there is a limit, *Glass v. Ickes*, *supra*, 117 F.(2d) at 277, the

limit was reached with respect to a judicial officer. In *Murray v. Brancato*, 290 N.Y. 52, 48 N.E.(2d) 257 (1943), a judge had included defamatory remarks in his opinion which he forwarded to the official reporter of the state as required by statute. The court ruled that the judge had acted outside the scope of his authority when he made the same opinion available to the unofficial reporters without their request, since he was under no duty to do so. It is submitted, however, that this is an overly-strict application of the rule of privilege as applied to judicial officers.

In summary, it is reasonable to conclude that the doctrine of absolute privilege accorded the communications of high-ranking public officials has been steadily expanded. With considerations of the public interest and well-being as the foundation, and with only the broadly-defined "scope of authority" as the test, immunity from civil liability has been granted almost without exception. Though abuses of the privilege are readily imaginable, they afford little reason for limiting the freedom of expression which the official must have in the exercise of his office.

William J. Priebe

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TAXATION—FEDERAL INCOME TAXES—CAPITAL v. ORDINARY LOSS —TRANSFEREE'S PAYMENT OF JUDGMENT AGAINST DISSOLVED CORPORATION.—*Arrowsmith v. Commissioner*, .... U.S. ...., 73 S.Ct. 71, 97 L.Ed. \* 19 (1952). A judgment rendered against a corporation was paid in 1944 by the two former owners of its stock in their capacity as transferees of the assets of the corporation. The corporation had been liquidated over a four year span, with a final distribution being made in 1940. Profits realized upon liquidation were correctly returned for federal income tax purposes as capital gains. Petitioners seek to have the judgment paid in 1944 regarded as an ordinary business loss, hence 100% deductible in that year. The Commissioner contended that the sum so paid constituted a capital loss. The Court of Appeals for the Second Circuit reversed the Tax Court, which had found for the taxpayers, and affirmed the Commissioner's contention. Certiorari was granted to review a conflict between circuits upon this issue: May a loss suffered by a taxpayer in a subsequent taxable year, which loss was related to and grew out of a transaction culminating in capital gains in prior taxable years, be regarded as an ordinary business loss? The Supreme Court answered in the negative, holding that the loss was clearly a capital one.

The principle that a taxable year stands by itself may be attributed to *North American Oil Consolidated v. Burnet*, 286 U.S. 417, 52 S.Ct. 613, 76 L.Ed. 1197 (1932), which was cited by the majority. The case simply held that the year in which a taxpayer first became entitled to, and received income under a claim of right constituted the year for which the income must be reported on his income tax return. Even though the taxpayer was required to repay the amount in a subsequent taxable year, a deduction for the repayment could only be

taken for the year in which it was made. *North American Oil Consolidated v. Burnet*, *supra*, 286 U.S. at 424. The principle enunciated is not broad enough, however, to preclude inquiry into the nature of the original transaction upon new facts being brought to light. Here the object is not to amend prior returns—a practice forbidden by *North American Oil Consolidated v. Burnet*, *supra*—but, as the instant case points out, 73 S.Ct. at 73, to determine the tax consequence of the transaction in the current year by a study of its origin and nature.

*Dobson v. Commissioner*, 320 U.S. 489, 64 S.Ct. 239, 88 L.Ed. 248 (1943), revealed a definite tendency towards permitting inquiry into the original transaction to determine the effect of the transaction in a subsequent taxable year. The court said, 320 U.S. at 493:

The Tax Court has not attempted to revise liability for earlier years closed by the statute of limitation, nor used any expense, liability, or deficit of a prior year to reduce the income of a subsequent year. It went to prior years only to determine the nature of the recovery, whether return of capital or income.

Thus the much discussed case of *Dobson v. Commissioner*, *supra*, seems to favor the present ruling although its force along other lines has been modified. See, *e.g.*, the dissent of Justice Jackson in the principal case, 73 S.Ct. at 74-5; SURREY AND WARREN, *FEDERAL INCOME TAXATION: CASES AND MATERIALS* 376 (1950).

In *United States v. Lewis*, 340 U.S. 590, 71 S.Ct. 522, 95 L.Ed. 560 (1950), the Court stood firmly upon the principle of the inviolability of prior taxable years. The taxpayer was not allowed to reopen an earlier return to adjust the amount of a bonus erroneously reported in that year, for he had received it under a claim of right. Nothing was said concerning inquiry into past transactions to determine their present tax consequences.

In the instant case Justice Jackson's dissent, concurred in by Justice Frankfurter, implies that the majority was influenced by "solicitude for the revenues" to the Treasury. Justice Jackson pointed out, 73 S.Ct. at 74, that while the rule of the majority increases revenue in this one instance, it may well be that in another situation the taxpayer might be benefited by invoking the rule. *Commissioner v. Carter*, 170 F.(2d) 911 (2d Cir. 1948), presented such a situation. There the taxpayer realized a gain upon dissolution of a corporation, the gain being given capital treatment. In a later taxable year the taxpayer realized a further gain upon certain assets transferred to her at dissolution. At the time of dissolution these assets had no ascertainable value. The court held this was a capital gain, noting that if the property had an ascertainable value at dissolution, it would have received capital gains treatment. The new fact of value later being realized did not change the nature of the property which was at all times a capital asset. Thus the Second Circuit by applying the principle declared by the instant case has favored the taxpayer in one instance and the Treasury in another. It must be presumed that the

majority when laying down the rule in the principal case was aware that the Treasury could not hope to gain every time the principle is invoked. In accord with the *Carter* case is *Westover v. Smith*, 173 F.(2d) 90 (9th Cir. 1949), which contained an analogous factual situation. See also *Milliken v. Commissioner*, 196 F. (2d) 135 (2d Cir. 1952).

The dissenting position finds support in Gold, *A Tax Problem in Corporate Liquidation*, 38 A.B.A.J. 245 (1952), where both *Commissioner v. Switlik*, 184 F.(2d) 299 (3d Cir. 1950) (rule rejected by instant case), and the present case as it was determined in the Second Circuit were discussed. The analysis attempted to show that on the basis of *North American Oil Consolidated v. Burnet*, *supra*, the transferee's payment of corporation taxes in the *Switlik* case in a subsequent taxable year was one transaction, while the liquidation dividend received in a prior taxable year was another entirely separate transaction. Further, taking the payment in the subsequent taxable year by itself, it is neither a sale nor an exchange of a capital asset. This possible construction of INT. REV. CODE §§ 23, 115 is now precluded by the present decision. See also the court of appeals decision in the instant case, *Commissioner v. Arrowsmith*, 193 F.(2d) 734 (2d Cir. 1952), and the comment thereon in CCH FED. TAX., CURRENT PRACTICE ¶1041 (1952).

While the reasoning on both sides can be supported, the issue is now settled and those affected can guide their conduct accordingly. As mentioned by Gold, *supra*, at 246, the prudent path in the light of the conflict would have been to retain a sufficient sum pending final determination of any liability against the corporation. This would seem to be mandatory now to prevent a situation such as befell the taxpayer in the principal case.

Anthony V. Amodio

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TORTS—THE RIGHT OF PRIVACY.—*Eick v. Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E.(2d) 742 (1952). The plaintiff alleged that the defendant used her photograph without authority for advertising and commercial purposes, and that due to this advertisement she had suffered much embarrassment and mental anguish. The trial court dismissed the suit for failure to state a cause of action, and plaintiff appealed. The appellate court reversed the holding of the trial court and said that the plaintiff's right of privacy had been violated. This was the first decision on the question whether or not the right of privacy is entitled to judicial recognition in the state of Illinois.

Since the recognition of the right of privacy is a recent legal development, and since the tort action for its violation is also relatively modern, it seems advisable to define the right. Definitions have been advanced by several courts. *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W.(2d) 972 (1929); *Holloman v. Life Ins. Co. of Virginia*, 192 S.C. 454, 7 S.E.(2d) 169 (1940). One of the clearest was com-

posed by the court in *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967, 970 (1927), where it was described as:

. . . the right to be let alone, that is, the right of a person to be free from unwarranted publicity, or the right to live without unwarranted interference by the public about matters with which the public is not necessarily concerned.

See also Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

The first state to consider the doctrine was New York—the right of privacy was recognized in *Marks v. Jaffa*, 6 Misc. 290, 26 N.Y. Supp. 908 (N.Y. Super. Ct. 1893). But in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), the court denied the existence of the right and refused to grant an injunction where, without consent, the defendant made use of the picture of the plaintiff to advertise its flour. However, at the next session of the New York legislature, a statute was enacted giving a right of action to one whose name or portrait was used for advertising or trade purposes without his consent. See N.Y. CIVIL RIGHTS LAW §§ 50, 51.

Three years after *Roberson v. Rochester Folding Box Co.*, *supra*, what is now considered the leading case on the right of privacy was decided in the state of Georgia. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). There the court held that the law recognized the right of privacy, and that when one used the photograph of another for advertising purposes without the consent of that person, he was invading that right. The court predicted, 50 S.E. at 81, “that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability. . . .”

Even though the Georgia court set the precedent for granting relief on the basis of a right of privacy, some courts have instead found other bases of liability, such as defamation, *Turner v. Brien*, 184 Iowa 320, 167 N.W. 584 (1918); breach of express or implied contract, *McCreery v. Miller's Grocerteria Co.*, 99 Colo. 499, 64 P.(2d) 803, 805-6 (1936), *Bennett v. Gusdorf*, 101 Mont. 39, 53 P.(2d) 91, 93 (1935); the invasion of some property right, *Brex v. Smith*, 104 N.J. Eq. 386, 146 Atl. 34 (Ch. 1929); assault, *McGlone v. Hauger*, 56 Ind. App. 243, 104 N.E. 116 (1914); and nuisance, *Pritchett v. Board of Com'rs of Knox County*, 42 Ind. App. 3, 85 N.E. 32 (1908).

Of the many states which have acknowledged this new right, the right of privacy, the primary difference lies in the manner in which recognition is afforded. Where the right of privacy is recognized by judicial decision, courts have generally based it upon the constitutional guarantees of life, liberty and the pursuit of happiness. In order to enjoy these guaranteed rights, every individual has certain happenings and events which must remain private as to the public. *Pavesich v. New England Life Ins. Co.*, *supra*; *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931). Other states prefer to give the

right recognition by means of a statute. N.Y. CIVIL RIGHTS LAW §§ 50, 51; UTAH REV. STAT. ANN. § 103-4-9 (1933); VA. CODE § 8-650 (1950).

Through the years more and more courts have taken cognizance of the right of privacy, and today, decisions have established the right in Alabama, Arizona, California, District of Columbia, Florida, Georgia, Illinois (by virtue of the holding in the instant case), Indiana, Kansas, Kentucky, Michigan, Missouri, Montana, North Carolina, Oregon and Pennsylvania. See Yankwich, *The Right of Privacy: Its Development, Scope and Limitations*, 27 NOTRE DAME LAW. 499, 505 (1952).

In a case exemplifying the application of the right, it was alleged that the plaintiff had suffered damage as a result of the defendant's unauthorized use of her photograph in connection with advertising material. The court held that a cause of action had been stated. *Pallas v. Crowley, Milner & Co.*, 322 Mich. 411, 33 N.W.(2d) 911 (1948). See also *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.(2d) 306 (1949), where an optical manufacturer's use of the plaintiff's photograph as part of its advertisement was held to constitute an actionable invasion of the plaintiff's right of privacy. In *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P.(2d) 133, 139 (1945), the court said that an injury which caused one to suffer mental anguish was an injury to his person which violated his right of privacy.

The right is recognized and defined in RESTATEMENT, TORTS § 867 (1939):

A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.

It should be added that special damages need not be pleaded in order for the complainant to recover. *Pavesich v. New England Life Ins. Co.*, *supra*; *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S.W. 364 (1909).

At present, only one state expressly denies the judicial existence of the right of privacy. The court in *Henry v. Cherry & Webb*, 30 R.I. 13, 73 Atl. 97 (1909), repudiated the arguments in favor of the right of privacy and adopted the view of the New York court in *Roberson v. Rochester Folding Box Co.*, *supra*, and held that there is no independent right of privacy. It also added that this right in itself could not support an action at law for recovery of damages.

It is well settled that the right of privacy is subject to certain limitations. *Pavesich v. New England Life Ins. Co.*, *supra*. The right will not prohibit the publication of matter which is of legitimate public interest. *O'Brien v. Pabst Sales Co.*, 124 F.(2d) 167 (5th Cir. 1941), *cert. denied*, 315 U.S. 823, 62 S.Ct. 917, 86 L.Ed. 1220 (1942). Also, the right, like any other, may be waived by express or implied consent. *Continental Optical Co. v. Reed*, *supra*, 86 N.E. (2d) at 309.

The Illinois court in recognizing the right of privacy in the in-

stant case has wisely followed the weight of modern authority. It is this writer's conviction that the right of privacy, where not based upon statute, is predicated upon the constitutional guarantee of life, liberty and the pursuit of happiness, and that any court which would refuse to recognize this right would do so in open defiance of the Constitution.

Richard G. Dytrych

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WORKMEN'S COMPENSATION—ASSAULT BY COEMPLOYEE—RELATION BETWEEN RESULTING INJURIES AND EMPLOYMENT.—*Mutual Implement & Hardware Ins. Co. v. Pittman*, ...Miss., 59 So. (2d) 547 (1952). Pittman and Stewart were working at a job which involved the laying of a concrete floor in a garage. At certain intervals while the concrete mixing machine was being refilled, these two employees had no duties to perform. During one interval Stewart removed and lighted the last cigarette in a package. He then crushed the package into a small ball and threw it at Pittman, striking him on the back of the neck. In retaliation Pittman threw a pebble at Stewart, striking him about the shoulder. In neither case was harm or injury inflicted. Pittman then returned to his job and was waiting by the mixer when Stewart came up from behind and struck him a tremendous blow on the back of the head with a shovel. Pittman was knocked unconscious, his skull was fractured and he sustained a serious and permanent brain injury.

The Workmen's Compensation Commission granted Pittman an award which was affirmed by the Supreme Court of Mississippi. In affirming the decision of the commission, the court declared that it favored the broad and liberal construction of the Compensation Act.

The incidents that preceded the final blow fall within the category which is classified in the workmen's compensation decisions as "horseplay." The injury to the claimant did not occur during the "horseplay" since he had returned to his job; the injury, rather, was the result of a willful assault and battery committed by a fellow employee under provocation of the prior "horseplay." Is the injury incurred by the claimant compensable under the Workmen's Compensation Act? Or more specifically, does the injury arise out of the employment?

There is abundant authority holding that in factual situations like the instant case, compensation will not be awarded. An injury inflicted by an employee upon another employee purely to gratify a personal ill will, anger or hatred does not arise out of the employment within the meaning of the Compensation Acts. *Chicago Hardware Foundry Co. v. Industrial Commission*, 393 Ill. 294, 65 N.E. (2d) 778 (1946); *Mountain Ice Co. v. McNeil*, 91 N.J.L. 528, 103 Atl. 184 (1918); *Brown v. Industrial Commission*, 86 Ohio App. 256, 82 N.E. (2d) 878 (1948); 1 SCHNEIDER, THE LAW OF WORKMEN'S COMPENSATION § 294 (1932).

In *Mountain Ice Co. v. McNeil*, *supra*, the court denied an award

of compensation to a worker who was injured by his coemployee. The petitioner and a fellow employee were engaged in skylarking or "horseplay" while on the job. The president of the company and the foreman stopped them and ordered them back to work. Later the fellow employee hit the petitioner on the side of the head with an ice pick fracturing his skull and rendering him unconscious. The court pointed out that the statute does not compel the employer to be an insurer of the workman against every mishap while engaged in his employment. Only accidents arising out of and in the course of that employment were provided against. The court found that the accident was caused by a fellow workman doing a wrongful act that was entirely outside the scope of his employment and for which no compensation accrued.

In a recent Ohio case, a claimant was denied compensation for injuries sustained as a result of being willfully hit over the head with a pipe by a fellow employee. An altercation had arisen between the claimant and his assailant over the work being done for the employer. The claimant, to escape harm, ran out of the building; on his return five minutes later, the injuries were inflicted. The court stated that the injuries were not compensable because the altercation had ended prior to the injury and therefore there was no causal connection between the employment and the injury. *Brown v. Industrial Commission, supra*; accord, *Jackson v. Wilson*, 84 Ga. App. 684, 67 S.E. (2d) 161 (1951) (employee shot by coemployee over personal quarrel while riding to work on employer's truck); *Rice v. Revere Copper & Brass, Inc.*, 186 Md. 561, 48 A.(2d) 166 (1946) (death of employee caused by blow on the head by coemployee); *Texas Indemnity Ins. Co. v. Cheely*, 232 S.W.(2d) 124 (Tex. Civ. App. 1950) (janitor injured by an assault of a fellow janitor because of a false rumor).

As a result of the great number of peculiar facts involved in compensation cases, a number of cases have approached this problem with a more liberal attitude. Foremost among the states favoring a liberal construction is New York, although there is authority in that jurisdiction apparently favoring a stricter view. In *Scholtzhauer v. C. & L. Lunch Co.*, 233 N.Y. 12, 134 N.E. 701 (1922), a waitress engaged in her work was shot and killed by a coemployee because she had declined an invitation to go out with him. The court held that while the injury arose during the course of the employment, it did not arise out of it, and compensation was denied. Other New York cases, however, have reached a different conclusion. *Verschleiser v. Joseph Stern Son, Inc.*, 229 N.Y. 192, 128 N.E. 126 (1920); *Katz v. Reissman Rothman Corp.*, 261 App. Div. 862, 24 N.Y.S.(2d) 807 (3d Dep't 1941); *Levy v. World-Telegram*, 259 App. Div. 943, 19 N.Y.S.(2d) 890 (3d Dep't 1940), *aff'd*, 285 N.Y. 533, 32 N.E.(2d) 827 (1941).

The rationale of the cases holding that the injury is compensable, the liberal attitude, is well stated in *Hartford Accident & Indemnity Co. v. Cardillo*, 112 F.(2d) 11 (D.C. Cir.), *cert. denied*, 310 U.S. 649, 60 S.Ct. 1100, 84 L.Ed. 1415 (1940) (quoted from extensively in the



instant case), where the court stated that the fact that the work brought the workers together, creating the relationships and conditions, was sufficient to create the causal connection between injury and employment to bring the incident within the provisions of the act. The court pointed out, 112 F.(2d) at 14:

It is not the peculiar nature of the environment or of the risk, provided it is accidental, but the fact that the work brings the worker within the orbit of whatever dangers the environment affords that is important. It follows also that it is not necessary for the injury or the risk to be "natural," "normal," or predictable. When it is so, this fact, like "special danger," makes causal connection between work and injury more plain. But the very essence of compensation is that the injury be accidental, and that means unexpected.

In *Myers v. Louisiana Ry. & Nav. Co.* 140 La. 937, 74 So. 256, 259 (1917), the test used to determine whether the injuries arose out of the employment was "... that the nature of the employment was such that the risk from which the injury resulted was greater for the workman than for a person not engaged in the employment." This criterion was followed in a later case which involved a fatal assault by a fellow employee. *Ferguson v. Cady-McFarland Gravel Co.*, 156 La. 871, 101 So. 248 (1924). The court observed, 101 So. at 250, that "employment in gang work . . . necessitates collaboration, the working together of the employees constitutes the nature of such employment, and the risk of assault and personal injury to the employee is to be viewed from that aspect." Accord: *Milton v. T. J. Moss Tie Co.*, 20 So.(2d) 570, 572 (La. App. 1944); *Keyhea v. Woodard-Walker Lumber Co.*, 147 So. 830 (La. App. 1933).

In nearly all jurisdictions the Compensation Acts provide that before an injury can be compensable it must (1) be "in the course of" and, (not *or*), (2) "arise out of" the employment. Desmond, "*Arising Out Of and In the Course of Employment*" in *New York*, 26 NOTRE DAME LAW. 462 (1951). The courts are in agreement that the present problem clearly is "in the course of" the employment, but disagree as to whether it also "arises out of" it. Those courts holding that the injury is not compensable give the provision of the act the strict and narrow construction. They hold that in an assault to satisfy a personal grudge or anger there is no causal connection between the injury and the employment, and therefore the injury does not "arise out of" the employment. *Jackson v. Wilson*, *supra*; *Rice v. Revere Copper & Brass, Inc.*, *supra*; *Scholtzhauer v. C. & L. Lunch Co.*, *supra*.

The courts giving a broad and liberal construction hold that since the employment brings the employees into close proximity there is sufficient causal relation to justify finding that the injury "arises out of" the employment. *Hartford Accident & Indemnity Co. v. Cardillo*, *supra*.

The liberal interpretation of the provisions of the Workmen's Compensation Act is a distortion of the intent of the legislatures. If the legislatures desired that the employers be insurers of their workmen against assaults by coemployees for purely personal reasons they

would not set out the two specific requirements found in the Act. The courts should not burden the cost of industrial compensation by finding a causal relation where none exists.

James Kalo

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WORKMEN'S COMPENSATION — DAMAGES — CORRECTED VISION DETERMINING EXTENT OF EYE INJURIES.—*Lambert v. Industrial Commission*, 411 Ill. 593, 104 N.E.(2d) 783 (1952). This case arose under the Illinois Workmen's Compensation Law. The pertinent facts in the controversy were not disputed. It was stipulated that the petitioner, Lambert, was acting within the scope of his employment at the Caterpillar Tractor Company when he sustained an injury to his left eye. Prior to the accident, the plaintiff's naked vision was 20/400 in his right eye, and 20/500 in his left eye. Both eyes were corrected to 20/20 vision with the aid of glasses. On examination after the injury, it was revealed that while the naked vision in both eyes remained substantially the same, the left eye could be corrected, even with the aid of the strongest lenses, only to 20/50 vision. The right eye was not injured in the accident. It was also admitted that the left eye of the petitioner, because of the injury sustained, would not accommodate with the right eye and the eyes could not be coordinately used without diplopia or "double vision" ensuing. The left eye, while having a corrected vision of 20/50, was of little practical value since it could not function effectively with the right eye and was in effect industrially blind.

The arbitrator awarded compensation on the basis of a 75 per cent permanent loss of the eye. The commission disregarded this award and denied the claimant recovery. It was reasoned that the uncorrected vision of the plaintiff was 20/500 both before and after the injury. That the ability of the eye to respond to corrective means was in part destroyed was admitted; nevertheless, compensation was not allowed, since a comparison of naked vision before and after the injury was taken as the determinant. The circuit court upheld the commission's ruling, but the supreme court reversed and upheld the findings of the arbitrator.

The question presented in the case was whether the use of corrective glasses should be considered in determining the extent to which an eye has been injured. This problem has long perplexed the courts of this country, and in decisions upon this point a sharp and obvious cleavage has resulted. Because of the diversity among state workmen's compensation statutes, it is impossible to establish categorically a majority or a minority view. However, in studying the rulings of the jurisdictions, certain avenues of thought are discernible.

Some jurisdictions have held that the theory behind the workmen's compensation statutes is that the loss of earning power of the employed is the faculty to be compensated. Hence, the reasoning is that since the corrected vision enables a worker to fulfill his task in the employment world, the difference in corrected vision will determine the extent of any injury. The court in *Washington Terminal Co. v.*

*Hoage*, 79 F.(2d) 158, 161 (D.C. Cir. 1935), declared that the intention of the workmen's compensation law of the District of Columbia "is to provide compensation for loss or disability in earning power and not indemnity or damages for injury to a member of the body." In *Kelley v. Prouty*, 54 Idaho 225, 30 P.(2d) 769, 776 (1934), the court interpreted the Idaho statute in the same manner.

Other jurisdictions, however, state that the object of their compensation laws is to compensate the worker for the loss of a member or for a physical impairment as such. With this pronouncement of the purpose of the law, the damage done to the eye is to be the sole basis of compensation. *Graf v. National Steel Products Co.*, 225 Mo. App. 702, 38 S.W.(2d) 518 (1931), states that the theory of the Missouri law "is based upon disability due to the loss of a member or a part of a member or function and not upon diminution [sic] of earning power by reason of the loss of function." *Accord: Alessandro Petrillo Co. v. Marioni*, 33 Del. 99, 131 Atl. 164 (1925); *Marland Refining Co. v. Colbaugh*, 110 Okla. 238, 238 Pac. 831 (1925); *Pocahontas Fuel Co. v. Workmen's Compensation Appeal Board*, 118 W.Va. 565, 191 S.E. 49 (1937).

In Indiana there is a merger of the two views. The decision in *Shaw v. Rosenthal*, 112 Ind. App. 468, 469, 42 N.E.(2d) 383, 384 (1942), states that:

... the general purpose of the [Indiana] Workmen's Compensation Act is to compensate for functional loss, nevertheless those parts of the act which fix a definite amount of compensation for a specific injury are arbitrary in nature and are based not on loss of earning capacity but on actual physical loss.

A catalyst which has helped to precipitate the two opposing views towards the use of corrective lenses is the attitude that a court will assume towards the glasses themselves. If glasses are thought of as a complete and adequate substitute for naked vision, then their use in the assessment of damages will be a determining factor. The instant case; *Washington Terminal Co. v. Hoage*, *supra*, 79 F.(2d) at 161; *Cline v. Studebaker Corp.*, 189 Mich. 514, 155 N.W. 519, 521 (1915); *Stone v. Industrial Commission*, 93 N.E. (2d) 67, 70 (Ohio C.P. 1950); *Travelers' Ins. Co. v. Richmond*, 291 S.W. 1085, 1086 (Tex. Comm. App. 1927); all hold that since glasses are so effectively and frequently employed in modern society, defective eyes with corrective glasses are almost a complete substitute for natural eyesight.

Other jurisdictions have refused to accept this concept and have followed, instead, the reasoning enunciated in *Johannsen v. Union Iron Works*, 97 N.J.L. 569, 117 Atl. 639, 640 (1922), where it is stated:

The contention of the prosecutor must rest upon the proposition that a workman with glasses is the equal of a workman who does not have to depend upon glasses for proper vision. This means, using another illustration, that a laborer who has to wear a brace upon a weak or injured leg to get the same efficiency from the leg as if it were a sound member is on a parity with a laborer who has a perfect leg and requires no brace. We cannot accept this

view. . . . An eye dependent upon glasses for normal vision is not as good as an eye which requires no such aid for its vision.

*Accord: Globe Cotton Oil Mills v. Industrial Accident Commission*, 64 Cal. App. 307, 221 Pac. 658, 659 (1923); *Burdine's, Inc. v. Green*, 150 Fla. 361, 7 So. (2d) 460 (1942); *Livingston v. St. Paul Hydraulic Hoist Co.*, 203 Minn. 62, 279 N.W. 829 (1938).

There is a series of cases which seemingly establishes the rule that naked vision is the sole basis for deciding the extent of compensation. In those cases, because of the injury sustained, the lens of the eye has been removed and the ability of the eye to focus destroyed. Under those facts, glasses were never a complete substitute, since different strength lenses were required by the eye to focus at various distances. Corrective glasses were not taken into consideration in allowing compensation. *Juergens Bros. Co. v. Industrial Commission*, 290 Ill. 420, 125 N.E. 337 (1919); *Butch v. Shaver*, 150 Minn. 94, 184 N.W. 572 (1921); *Parrott Motor Co. v. Jolls*, 168 Okla. 96, 31 P. (2d) 925 (1934). However, as stated in the principal case, those cases are to be differentiated from those in which it is a fact that glasses can be an adequate substitute, and therefore the decisions do not conclusively establish the rule that naked vision is the sole determinant in awarding compensation. In the case at bar it was held that *Juergens Bros. Co. v. Industrial Commission*, *supra*, did not solidify the rule in Illinois that naked vision is to be the guide in granting compensation. The case was differentiated on its facts.

The rulings of the courts make it possible to conclude that except in the instances where the statute explicitly provides which test is to be used, the conflict of the authorities results in part from the inability of one rule to adequately cover all situations. Presuming that the statute is silent on the matter, let us suppose that an employee who has a congenital defective vision of 80 per cent, which is correctible to normal vision, is injured. After the accident there is a total deprivation of sight. If the naked vision test were applied, the blind employee would only receive compensation for a loss of 20 per cent of his vision. The corrected vision test would certainly be more just under those facts. However, assume that a person has perfect vision, and after an accident there remains only 10 per cent of that vision. This condition is correctible with glasses to perhaps 80 or 90 per cent of normal. If the "corrected" rule were applied, the law would not recognize the injury which has deprived the worker of 90 per cent of his naked vision. Conversely, if the uncorrected vision were to be the basis of compensation, the law would call a man blind who in reality could see as well as if unharmed.

Once it is accepted that vision corrected to normal by the use of glasses is almost a complete substitute for normal naked vision, then, where vision is able to be corrected to normal or near-normal after the injury, the difference between the highest corrected vision before and after the injury should determine the extent of the award.

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